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## The Spirit of the Laws

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On September 11, 2001, members of Osama bin Laden's Al Qaeda terrorist network apparently hijacked four civilian passenger airplanes and flew them into the World Trade Center and the Pentagon, killing approximately 3000 innocent civilians from more than 80 different countries. In the days since, I have been struck by how many Americans—and how many lawyers—seem to have concluded that, somehow, the destruction of four planes and three buildings has taken us back to a state of nature in which there are no laws or rules. In fact, over the years, we have developed an elaborate system of domestic and international laws, institutions, regimes, and decision-making procedures precisely so that they will be consulted and obeyed, not ignored, at a time like this.

In thinking about our response, we need to ask not just what the letter of the law permits and forbids, but which course of action most closely comports with the spirit of the laws. If such a "law-friendly" course exists, we should follow it; doing so will keep the law on our side, will keep us on the moral high ground, and will preserve the vital support of our allies, international institutions, and the watching public as the crisis proceeds. In seeking such a course, the best single benchmark will be the number of innocent civilians—of whatever nationality—who are killed, injured, or whose human rights are violated by acts committed on all sides of this crisis.<sup>1</sup> In the months ahead, our success at minimizing civilian casualties will act as the proverbial miner's canary: a telling gauge of whether our response remains faithful to the law, and an ominous warning of when it starts to veer in the wrong direction.

At the same time, we must acknowledge that September 11 is a tragedy potentially momentous enough to reshape the very architecture of the do-

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1. Included in this tally are former combatants who under the Geneva Conventions are entitled to be treated as prisoners of war. See David Rohde, *Executions of P.O.W.'s Cast Doubts on Alliance*, N.Y. TIMES, Nov. 13, 2001, at B1 (describing blatantly illegal Northern Alliance executions of Taliban prisoners of war); Tony Karon, *Afghan Prison Bloodbath Prompts Call for Inquiry*, TIME.COM, Nov. 30, 2001, <http://www.time.com/time/nation/printout/0,8816,186403,00.html> (describing reports that 400 or more Taliban prisoners held at Qalai Janghi fortress near Mazar-i-Sharif were killed by Northern Alliance artillery and U.S. airstrikes, and that some Taliban corpses were seen with their hands tied behind their backs).

mestic and international legal system developed in the wake of World War II. Internationally, the “Bush Doctrine” of declaring “war” on all terrorist networks of global reach and those states who “harbor” them has challenged the positivistic, state-centric, U.N. Charter-based understanding of the use of force that dominated the post-Cold War era.<sup>2</sup> Domestically, the event has already triggered a troubling wave of antiterrorism legislation and executive orders—linking domestic law enforcement and foreign intelligence functions, restricting civil liberties (especially of aliens), and authorizing the use of military courts—that challenge the core understandings of what I have elsewhere called “The National Security Constitution.”<sup>3</sup> At this writing, it remains to be seen whether our response to September 11 will unwisely undermine norms developed and internalized over the decades or prudently refurbish them to meet a twenty-first century reality. Ultimately, the legal legacy of September 11 will depend upon the fidelity of America’s actions to the spirit of the laws that undergird its post-war charter of global freedom and cooperation.

### I. THE INTERNATIONAL REALM

To paraphrase Justice Arthur Goldberg, international law is “not a suicide pact.”<sup>4</sup> Under international law, no one should be able to kill thousands of innocent civilians simply for going to work in the morning, then threaten to do so again with impunity.

International law thus appropriately grants the United States considerable freedom to pursue precisely the kind of broad-based response that it has undertaken in the aftermath of September 11: an approach that includes forceful and targeted military action, as part of a much larger strategy of diplomatic coalition-building, economic sanctions and assets-tracing, counterintelligence, law enforcement, public diplomacy, and democratization.

Under Article 51 of the U.N. Charter, the September 11 strikes constituted “armed attacks against a Member of the United Nations” and “[n]othing in the [U.N.] Charter shall impair the inherent right of individual or collective self defence if an armed attack occurs, until the Security Council has taken measures necessary to maintain international peace and security.” NATO has invoked Article 5 of its charter, which requires the

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2. See President George W. Bush, Address to a Joint Session of Congress and the American People, Washington, D.C. (Sept. 20, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> [hereinafter Address to a Joint Session] (“Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen . . . We will starve terrorists of funding, turn them one against another, drive them from place to place, until there is no refuge or no rest [sic]. And we will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.”).

3. HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990).

4. *Kennedy v. Mendoza-Martínez*, 372 U.S. 144, 160 (1963) (Goldberg, J.) (noting that “the Constitution is not a suicide pact”).

NATO parties to assist the attacked country—with armed force if necessary—in exercising its right of individual or collective self-defense under Article 51 of the U.N. Charter.<sup>5</sup> Once seized of the issue, the Security Council issued Resolutions 1368 and 1373, which properly declare a threat to international peace and security; reiterate the inherent right of individual and collective self-defense; and call on member states to cooperate to take action against the perpetrators of such acts and to bring to justice those responsible, as well as to take other steps to prevent and suppress future terrorist attacks.<sup>6</sup>

Some international law scholars have already questioned whether these resolutions in fact authorize the United States to use force against Afghanistan.<sup>7</sup> As military action evolves and escalates, the U.S. would be prudent to seek and obtain express Security Council authorization for additional uses of force, particularly as the exigency of immediate self-defense wrought by the events of September 11 lessens.<sup>8</sup>

However, a narrow, legalistic focus should not obscure the bigger picture: September 11 was an attack, not just on innocent civilians, but on the very spirit of international law. As U.N. Secretary-General Kofi Annan put it, September 11 “struck at everything [the United Nations] stands for: peace, freedom, tolerance, human rights, . . . the very idea of a united human family[,] . . . all our efforts to create a true international society, based on the

5. Art. 5 of the North Atlantic Treaty provides:

The Parties agree that an armed attack against one or more of them in . . . North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 34 U.N.T.S. 243.

6. See S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001) (Threats to International Peace and Security Caused by Terrorist Acts); S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001) (Threats to International Peace and Security Caused by Terrorist Acts). Resolution 1368 expressed the Security Council’s “readiness to take all necessary steps to respond to the terrorist attacks. . . .” and called on member states to take measures such as to “work together urgently to bring to justice the perpetrators” and to “implement anti-terrorist conventions.” Resolution 1373 went further and “*decided*” that certain specific steps should be taken under Chapter VII of the U.N. Charter, including the measures of cooperation specified in the prior resolution, criminalizing under domestic law the provision of funds to terrorists, freezing assets of persons who support terrorists, prohibiting making funds or financial or related services available, directly or indirectly, for the benefit of terrorists, preventing the movement of terrorists. Resolution 1373 also called upon states to screen refugees to ensure that there are no terrorists among them.

7. See, e.g., Jonathan I. Charney, *The Use of Force Against Terrorism and International Law*, 96 AM. J. INT’L L. (forthcoming Oct. 2001) (that the U.S. use of force without Security Council authorization under Chapter VII of the U.N. Charter creates an undesirable precedent damaging to the U.N. system).

8. In both Resolutions, the Security Council expressly left open the possibility of future action. See S.C. Res. 1368, *supra* note 6, ¶ 5; S.C. Res. 1373, *supra* note 6, ¶ 8. The latter Resolution (S.C. Res. 1373) “[e]xpresses [the Council’s] determination to take all necessary steps in order to ensure the full implementation of this resolution, in accordance with its responsibilities under the Charter,” and establishes committees to consider how the situation might be addressed and to report back to the Council).

rule of law.”<sup>9</sup> The terrorists sought to jeopardize not just American security but the entire postwar system of free global transport, communications, markets, and self-government that the United Nations and the Bretton Woods international economic organizations have sought to build. At stake is the “positive face of globalization”: the ability, which we had come to take for granted, to fly across borders at a moment’s notice, to invest money in 24-hour worldwide markets, and to communicate with others around the world at any moment, all without fear or impediment.

September 11 thus challenges the international community to mobilize this constructive face of globalization to overcome its most destructive face. In so doing, the greatest task will be building and mobilizing a durable coalition of countries that share respect for the universal values of human rights and the rule of law. In particular, as the world’s leading democracy, the United States must enlist the world’s other democracies, which numbered only 25 three decades ago but which have grown to some 120 today.<sup>10</sup> These countries should join the coalition not solely out of a fear that they too might be attacked, but from an affirmative recognition that they too have enormous stakes in maintaining the postwar agenda of global freedom and cooperation that the terrorists have put in jeopardy.

Political scientists have felled forests demonstrating that democracies do not fight with one another.<sup>11</sup> However, September 11 reveals that the real test will be whether post-Cold War democracies can actually cooperate with each other effectively enough to defeat such vexing global problems as international terrorism. In the Warsaw Declaration, signed at the first Community of Democracies meeting in Warsaw, Poland, in June 2000, the 106 democratic governments gathered declared: “We resolve to strengthen cooperation to face transnational challenges to democracy, such as state-sponsored, cross-border and other forms of terrorism, . . . and to do so in accordance with respect for human rights of all persons and for the norms of international law.”<sup>12</sup> In short, these democracies have vowed to use this *globalization of democracy* as an antidote to the *globalization of terror*.

9. Press Release, United Nations, Secretary-General Urges Assembly To Respond To 11 September Attacks By Reaffirming Rule Of Law (Sept. 24, 2001) (U.N. Doc. SG/SM/7965), <http://www.un.org/News/Press/docs/2001/sgsm7965.doc.htm>.

10. These statistics are drawn from Freedom House, *Democracy’s Century: A Survey of Global Political Change in the 20th Century* (1999), <http://www.freedomhouse.org/reports/century.html>. See also Harold Hongju Koh, *The Globalization of Freedom*, 26 YALE J. INT’L L. 305 (2001).

11. For a collection of essays on this subject, see generally *DEBATING THE DEMOCRATIC PEACE* (Michael E. Brown et al. eds., 1996).

12. Final Warsaw Declaration: Toward a Community of Democracies, Community of Democracies Ministerial Meeting, Warsaw, Poland (June 27, 2000), [http://www.state.gov/www/global/human\\_rights/democracy/000627\\_cdi\\_warsaw\\_decl.html](http://www.state.gov/www/global/human_rights/democracy/000627_cdi_warsaw_decl.html). For additional supporting documents, see Bureau of Democracy, Human Rights, and Labor, Department of State, Community of Democracies: Official Texts, [http://www.state.gov/www/global/human\\_rights/democracy/cdi\\_text.html](http://www.state.gov/www/global/human_rights/democracy/cdi_text.html). At the Warsaw conference, U.N. Secretary General Kofi Annan declared:

As Secretary General of the United Nations, I am particularly gratified that this new coalition is meeting to support the founding values of our Organization, as set out in the Charter and in the

Perhaps the most critical, yet overlooked, element of this strategy will be working not just with democratic governments, but with forces of democratization *within* even the most despotic countries. Those who have spoken of “ending” states that harbor terrorists forget that countries are not unchanging monoliths.<sup>13</sup> The recent events in Afghanistan have shown that in the most repressive states, the challenge is how best to support internal forces of democratization over the forces of terror. To discourage states from harboring terrorists, we must use carrots, not just sticks, to support the law-abiding civil society groups who favor the democratic path in those countries.<sup>14</sup> We need to work creatively, and on a people-to-people basis, with foreign universities, nongovernmental organizations, civil society groups, independent media, labor unions, women’s groups, and political parties to demonstrate to would-be terrorists that global freedom and cooperation are far more likely than global terrorism to engender not just long-term prosperity, but genuine prospects for humane self-government.

The newly announced Bush Doctrine of declaring “war” on global terrorist networks and the states who harbor them fits awkwardly with the positivistic, state-centric, U.N. Charter-focused understanding of the use of force that dominates international law. Under that understanding, as one commentator puts it, “absent actions in self-defence under U.N. Charter Article

Universal Declaration of Human Rights. Indeed, the theme of this conference: ‘Towards a Community of Democracies’ represents my own most profound aspiration for the United Nations as a whole. When the United Nations can truly call itself a community of democracies, the Charter’s noble ideals of protecting human rights and promoting ‘social progress in larger freedoms’ will have been brought much closer.

U.N. Secretary-General Kofi Annan, Closing Remarks to Community of Democracies Ministerial Meeting (June 27, 2000), <http://democracyconference.org/kofiannan.html>. Three days after the September 11 tragedy, the two original sponsors of the Warsaw conference, former Secretary of State Madeleine Albright and former Polish Foreign Minister Bronislaw Geremek, issued a statement recalling that provision in the Warsaw Declaration and stating:

We believe it is critical that the democratic states of the world cooperate together in developing and implementing effective measures against terrorism, including steps to bring to justice those who carry out terrorist acts or who harbor and otherwise provide support for terrorists.

We call upon the states that endorsed the Warsaw Declaration to honor this commitment and to work together to respond effectively to these cowardly and unspeakable acts. Specifically, we urge the members of the convening group of the Community of Democracies to use this forum to debate and implement appropriate steps consistent with respect for human rights and international law.

Statement, for Continuation of the Initiative of Warsaw Declaration “Towards Community of Democracies” (Sept. 14, 2001) (on file with the Harvard International Law Journal).

13. Shortly after September 11, Deputy Secretary of Defense Paul Wolfowitz said, “it’s not just simply a matter of capturing people and holding them accountable, but removing the sanctuaries, removing the support systems, [and] *ending states who sponsor terrorism*,” (emphasis added). Dan Ackman, *U.S. On Guard*, FORBES.COM, Sept. 14, 2001, <http://www.forbes.com/2001/09/14/0914disasterday4.html>. Asked about that comment, Secretary of State Colin L. Powell responded, “We are after ending terrorism. And if there are states and regimes, nations, that support terrorism, we hope to persuade them that it is in their interests to stop doing that . . . .” Press Briefing, Secretary of State Colin L. Powell (Sept. 17, 2001), <http://www.state.gov/secretary/rm/2001/index.cfm?docid=4929>.

14. Concretely, this means giving foreign and development aid, debt relief, and democracy-building and rule of law programs, not just in the countries whose specific help we need for this anti-terrorism struggle, but in other potential breeding grounds for terror (especially in Africa, Central Asia, and the Middle East), where democracy is weak.

51, uses of force against the territorial integrity or political independence of another state must be [affirmatively] authorized by [the Security Council] under Chapter VII.”<sup>15</sup> If not, the positivist vision declares, they must be illegal, even if—like the NATO military actions in Kosovo—they are in some sense morally justified by the need to prevent or minimize gross human rights violations.<sup>16</sup> In this case, the September 11 strikes constituted not just armed attacks, but “crimes against humanity,” namely, murder and other inhumane acts committed as part of a widespread or systematic attack directed against any civilian population.<sup>17</sup> Further, if, as President Bush declared, these acts are treated not as isolated attacks, but as “acts of war,”<sup>18</sup> the September 11 attacks plainly constitute war crimes as well.<sup>19</sup>

In this case, the direct perpetrators of the human rights violations are non-state actors operating in many countries with varying degrees of passive or active governmental support. Within the U.N. Charter framework, forceful actions against states within whose territory such actors may be found can only be justified on the grounds of vicarious state responsibility. As in the Kosovo situation, the textual restrictions on state-to-state uses of force embodied in the U.N. Charter fail to address or remedy adequately the human rights violations that such terrorists and their state supporters may inflict. In the months ahead, international lawyers need to reexamine the presumption that the need to respect Article 2(4) automatically trumps our global duty to prevent genocide or to forestall terrorist acts upon civilians that strike at the very spirit of the U.N. Charter.<sup>20</sup>

15. Charney, *supra* note 7, manuscript, at 2.

16. In discussing Kosovo, academic commentators have focused upon the text of Article 2(4) of the U.N. Charter—with its stress on territorial integrity—and the uneven historical practice of obtaining affirmative Security Council authorizations before engaging in collective uses of force. See, e.g., Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 32 VAND. J. TRANSNAT'L L. 1231 (1999). In so doing, they have tended to understate the equally important text of Article I of the Genocide Convention, which “confirm[s] that genocide, whether in time of peace or in time of war, is a crime under international law which [the Contracting Parties] undertake to prevent . . .,” an obligation violated with regard to recent genocides in Iraq, Cambodia, and Rwanda. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 1, 102 Stat. 3045, 78 U.N.T.S. 277 (emphasis added).

17. Crimes against humanity are crimes under customary international law, prohibited by all persons irrespective of nationality or national laws. For a list of the acts that rise to the level of crimes against humanity, see Rome Statute of the International Criminal Court, July 17, 1998, art. 7, U.N. Doc. A/CONF.183/9 (1998) [hereinafter ICC Statute].

18. Address to a Joint Session, *supra* note 2 (“On September the 11th, enemies of freedom committed an act of war against our country.”).

19. War crimes include such acts undertaken in international armed conflict as “[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.” For a range of the acts that rise to the level of war crimes, see ICC Statute, *supra* note 17, art. 8(2)(b).

20. As Professor Henkin has noted,

Kosovo demonstrates yet again a compelling need to address the deficiencies in the law and practice of the U.N. Charter. The sometimes-compelling need for humanitarian intervention (as at Kosovo) . . . brings home again the need for responsible reaction to gross violations of the Charter, or to massive violations of human rights, by responsible forces acting in the common interest. . . . [P]roponents of a ‘living Charter’ would support an interpretation of the law and an adaptation of U.N. procedures that rendered them what they ought to be. That might be the lesson of Kosovo.

In short, human rights and the spirit of the U.N. Charter require a forceful response to September 11. But if the United States invokes human rights to justify forceful action, it must necessarily accept human rights as a binding constraint on its own use of force. If the United States chooses to treat this as a "war," it is strictly bound to observe the international laws of war, which terrorists scorn, but responsible democracies must obey. That means American and British military exercises must scrupulously avoid targeting civilians, using indiscriminate weapons, or carelessly striking civilian targets or humanitarian aid centers.<sup>21</sup> As this conflict unfolds, the United States and its coalition partners can only rebut a claim of double standards by demonstrating that they have genuinely internalized international legal commitments to respect human rights.

This suggests another rule of thumb: *the more massive, the more unilateral, the more indiscriminate, and the more prolonged our use of force is, the more likely it is to violate both the letter and spirit of international law.* If the United States responds to the death of civilians at home by intentionally or carelessly killing civilians abroad—who, in societies such as Afghanistan and Iraq, may themselves be victims of flagrant human rights abuse—it will dishonor its own civilian dead, trigger further retaliation, and almost surely alienate the allies, human rights groups, and Muslim states it seeks to enlist in its "durable coalition." The tally of innocent civilians must also include the thousands of Afghan refugees generated by this conflict, who are increasingly at risk as the conflict continues,<sup>22</sup> as well as those civilians in some repressive countries—including China, Pakistan, Russia, Saudi Arabia, and Uzbekistan—that the United States has sought to enlist in the antiterrorism campaign.<sup>23</sup> During the Cold War, the United States too often tolerated antidemocratic behavior and human rights abuses by friendly dictators. Tolerating similar behavior in the name of winning the "war against terrorism," undermines the United States' worldwide interest in promoting human rights and democratization. Nor does it make political sense, at a time when

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Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention,"* 93 AM. J. INT'L L. 824, 827 (1999).

21. See generally Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1 (2002). Unfortunately, mistakes have been made. See Elizabeth Becker & Eric Schmitt, *A Nation Challenged: The Bombing; U.S. Planes Bomb A Red Cross Site*, N.Y. TIMES, Oct. 27, 2001; Human Rights Watch Background, Cluster Bombs in Afghanistan (Oct. 2001), <http://www.hrw.org/background/arms/cluster-bck1031.htm> (charging that the United States has been using CBU-87 cluster bombs, which have wide dispersal pattern and cannot be targeted precisely, as well as a significant non-explosion rate, which leaves them lying on the ground like dangerous de facto antipersonnel ordnance).

22. If our military action endangers humanitarian aid workers, hampers delivery of emergency food aid, or provokes further refugee outflows, we could share responsibility for a human rights crisis in Afghan and Pakistani refugee camps that could dwarf the original September 11 attacks. See Rajiv Chandrasekaran, *Predicted Outpouring of Afghan Refugees is More Like "Trickle,"* WASH. POST, Nov. 1, 2001, at A21 (estimating about 80,000 refugees entering Pakistan after twenty-five days of U.S.-led attacks, in addition to some two million who are already there from previous conflicts).

23. See, e.g., C. J. Chivers, *A Nation Challenged: Complications; Alliance With U.S. Spotlights Uzbek Rights Abuses*, N.Y. TIMES, Oct. 30, 2001.

the United States is denying that it is pursuing a war against Islam, to condone Russian atrocities against Chechen Muslims, the Uzbekistan government's crackdown on Muslim religious groups, or the Chinese repression of Uighur Muslims in Xinjiang.<sup>24</sup> Speaking in Uzbekistan in April 2000, then-Secretary of State Madeleine Albright announced:

[T]he United States will not support any and all measures taken in the name of fighting drugs and terrorism or restoring stability. One of the most dangerous temptations for a government facing violent threats is to respond in heavy-handed ways that violate the rights of innocent citizens. Terrorism is a criminal act and should be treated accordingly—and that means applying the rule of law fairly and consistently. We have found, through experience around the world, that the best way to defeat terrorist threats is to increase law enforcement capacities while at the same time promoting democracy and human rights.<sup>25</sup>

## II. THE DOMESTIC REALM

Secretary Albright's words apply with equal force to the United States' efforts to balance security and civil liberties at home. Any tally of the human rights injuries inflicted upon innocent civilians during this crisis must include those Americans and aliens within its borders who are arbitrarily detained; who are discriminated against based on racial profiling; whose privacy is abused; whose right to travel, speak or associate is unconstitutionally restricted; and whose victimization by hate crimes goes unaddressed, all in the name of rooting out terrorists.

For all the talk of "war," as a legal matter, the United States is neither formally in a state of war, nor even in a congressionally declared national emergency. In authorizing the President to respond, Congress did not declare war. Had it done so, it would have triggered a series of extraordinary statutory powers that authorize the President in times of declared war to seize property, businesses, and manufacturing facilities; to restrict otherwise lawful political activities; and to obtain wiretaps without a court order.<sup>26</sup>

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24. See Secretary of State Madeleine K. Albright, Speech at University of World Economy and Diplomacy, Tashkent, Uzbekistan (Apr. 17, 2000), <http://secretary.state.gov/www/statements/2000/000417.html> ("It is essential to distinguish between people who advocate or commit criminal acts and those who are simply expressing their religious faith. There is no more fundamental right in any democracy than the right of a person to be judged by his or her actions rather than by assumptions about his or her beliefs or heritage or ethnicity. For instance, it would be a terrible mistake for any government to treat peacefully practicing Muslims as enemies of the state. Many Islamic leaders are playing a very constructive role in helping this region adjust to the demands of the new era.").

25. *Id.* Secretary Albright further noted, "indiscriminate government censorship and repression can cause moderate and peaceful opponents of a regime to resort to violence. It can turn civilians who have never before been interested in politics into extremists. These kinds of measures are not only abusive of human rights—they are also likely to fail." *Id.*

26. See, e.g., 10 U.S.C. § 2538 (1994) (providing the power to seize a wide array of property, businesses, and manufacturing facilities); 50 U.S.C. § 1811 (1994) (allowing the government to obtain wire-



Instead, Congress passed, and the President signed, a Use of Force resolution, which declared that the September 11 attacks “pose[d] an unusual and extraordinary threat to the national security and foreign policy of the United States” and gave the President very broad discretion without time limit to use “all necessary and appropriate force against all entities”—whether foreign or domestic—“so long as he determines that they planned, authorized, committed or aided the September 11 attacks,” and so long as such force is used “in order to prevent future attacks.”<sup>27</sup>

But under our National Security Constitution, the President is our commander-in-chief, not the king. As I suggested some years ago:

[I]n foreign as well as domestic affairs, the Constitution requires that we be governed by separated institutions *sharing* foreign policy powers . . . . [With regard to most issues,] governmental decisions regarding foreign affairs must transpire within a sphere of concurrent authority, under presidential management, but bounded by the checks provided by congressional consultation and judicial review.<sup>28</sup>

The War Powers Resolution, which Congress passed over presidential veto in 1973, is one such sphere. It is a framework statute, which imposes consultation, reporting, and durational limits on presidential war-making.<sup>29</sup> Significantly, Congress’s Use of Force Resolution does not repeal or supersede the War Powers Resolution, but rather explicitly invokes that law.<sup>30</sup> Therefore, as this conflict escalates, the American people, through their elected representatives in Congress, have a legal right to receive reports and to be consulted by the President with respect to troop commitments abroad, and to authorize the long-term maintenance of U.S. Armed Forces in hostile or imminently hostile situations. What is critical, once again, is the spirit of the law: the War Powers Resolution rests on the commonsense notion that before the President takes us into an extended and escalating undeclared

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taps without a court order). A “state of war” could also grant the government power to restrict otherwise lawful political activities if, for example, they are deemed to “obstruct” military recruitment, 18 U.S.C. § 2388 (1994), or the power to “cause the closing of *any facility or station for wire communication*” (emphasis supplied), and to authorize its “use or control” by the government, 47 U.S.C. § 606 (1994), a power with broad internet implications.

27. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) [hereinafter Use of Force Resolution].

28. KOH, *supra* note 3, at 69. (“In short, the structural principle that animates our National Security Constitution is *balanced institutional participation*.”).

29. See *id.* at 38–40 (discussing War Powers Resolution of 1973, 50 U.S.C. §§ 1541–1548 (2000)).

30. See Use of Force Resolution, *supra* note 27, § (b)(2) (“Nothing in this resolution supercedes [sic] any provision of the War Powers Resolution”). Because the Use of Force Resolution incorporates the War Powers Resolution by reference, it should not be confused with the infamous Gulf of Tonkin Resolution of 1964, H.R.J. Res. 1145, 88th Cong., 78 Stat. 384 (1964) (repealed 1971), an open-ended legislative grant of war-making authority that several successive presidents construed as unfettered congressional authorization to escalate the undeclared Vietnam War. See KOH, *supra* note 3, at 38–39.

war, he should both regularly consult with and genuinely listen to elected officials who do not owe their jobs to him.<sup>31</sup>

In the late 1990s, to promote genuine, continuing interbranch consultation during extended armed conflicts, Senators Robert G. Byrd, Sam Nunn, John W. Warner, and George J. Mitchell introduced war powers legislation that would have required the President, before using force, to consult with a "core consultative group," consisting of the leaders of both houses and the ranking bipartisan members of the armed services, foreign affairs, and intelligence committees of each house.<sup>32</sup> Their goal was to provide the President and his staff with an expert group of legislative members with access to classified information, who could offer him a regular "political reality check," without demanding unacceptable sacrifices in speed, flexibility, or secrecy of decision-making. Korea and Vietnam taught that protracted, open-ended undeclared wars tend to leave troops and Presidents unsupported and legislators unaccountable. To avoid repetition of this unhappy history during the current crisis, which could go on indefinitely, Congress and the President should extend the spirit of the War Powers Resolution by formalizing regular classified briefings of precisely such a core consultative group.<sup>33</sup> That group could meet regularly and give the President informed, bipartisan support for any additional emergency legislation that might be required as this crisis proceeds.

Just as one must recognize that the Bush Doctrine fits awkwardly into the international law doctrine governing the use of force, one must also acknowledge that it fits awkwardly (at best) into the constitutional rubric of "war powers," which has generally addressed only nation-to-nation conflicts. The spirit of Article I, section 8, clause 10 of the Constitution fits the current situation far better. This provision authorizes Congress to "define and punish Piracies, Felonies committed on the High Seas, and Offenses against the Law of Nations." The Framers drafted that language specifically to address situations where private actors—pirates, slave traders, and other early terrorists—collaborate with sovereign governments to terrorize the populations of civilized nation-states.<sup>34</sup> Acting expressly under the "Law of Na-

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31. See Harold Hongju Koh, *War and Responsibility in the Dole/Gingrich Congress*, 50 *MIAMI L. REV.* 1, 8 (1996) ("The goal of a constitutional process should not be to specify policy results, but to force the institutional players into a dialogue about which political ends they collectively seek and which they prefer to avoid.").

32. S.J. Res. 2, 101st Cong. (1989); 135 *CONG. REC.* S167, S184–85 (daily ed. Jan. 25, 1989). For a detailed description of the Byrd-Nunn-Warner-Mitchell proposal, see KOH, *supra* note 3, at 166–81.

33. If Congress and the President agreed on the wisdom of such an approach they could formalize such briefings either by statute or by custom. Several weeks after the September 11 attacks, after details from a classified intelligence briefing on Capitol Hill were apparently leaked to the press, President Bush briefly overreacted by restricting top-secret congressional briefings to eight specified congressional leaders. After the excluded legislators vociferously protested, he quickly relented. See Mike Allen & Lisa de Moraes, *White House to Reinstate Some Congressional Briefings*, *WASH. POST*, Oct. 11, 2001, at A8.

34. At the founding of the Republic, pirates, privateers and other early terrorists probably posed as great a threat to our nation as sovereign states bent on war. In 1790, Congress exercised this power by passing statutes criminalizing such international crimes as piracy, and not long after, supported President

tions" clause, Congress should now pass legislation authorizing the President to punish the perpetrators of the September 11 attacks for what they are: international criminals and violators of the law of all civilized nations. That legislation should define the acts underlying the September 11 attacks as examples of international crimes it has identified in the past.<sup>35</sup> Through such an explicit constitutional reference, Congress would make clear that American military and law enforcement personnel enforcing the "Law of Nations" are bound to obey, for example, those international law rules that forbid torture, racial discrimination, prolonged arbitrary detention or the intentional or careless killing of innocent civilians. By so saying, Congress and the President would effectively internalize the spirit of international human rights and humanitarian rules through domestic law as restraints upon overreaching by those officials charged with the difficult task of responding to the terrorist threat.<sup>36</sup>

In the same way as September 11 has begun to distort the shape of international law, it has already begun to warp the balance between domestic national security and civil liberties law that has prevailed for more than half a century. The National Security Act of 1947,<sup>37</sup> enacted just after World War II, formalized several guiding principles of United States national security law. The first was a division of management: overt wars would be managed by military officials subject to civilians under presidential control; covert intelligence-gathering would be carried out by agencies directed by the President with the advice of the National Security Council; and the CIA would be expressly denied police, subpoena, law-enforcement and internal security functions to ensure that it would act as a national security agency, not as a domestic law enforcement unit.<sup>38</sup> Second, the Supreme Court has long recognized aliens lawfully admitted to our shores as "persons" entitled to the equal protection of the laws, who—with the exception of the right to

Jefferson in authorizing the Navy to retaliate against the Barbary pirates. *See, e.g.*, Act of Apr. 30, 1790, ch. 9, §§ 8, 28, 1 Stat. 112, 113–14, 118 (1790). More recently, Congress has used this power to criminalize such "offenses against the Law of Nations" as attacks against aviation, 18 U.S.C. § 1201 (1994); diplomats, *id.* §§ 112, 8178; hostage-taking, *id.* § 1203; and theft of nuclear materials, *id.* § 831.

35. By acknowledging that it had *previously* defined hijacking, sabotage, and hostage-taking as international crimes, Congress would avoid any judicial challenge that might be based on the constitutional prohibition against *ex post facto* crimes.

36. Such a statute would constitute American "legislative internalization" of international criminal law. *See* Harold Hongju Koh, *Bringing International Law Home*, 35 Hous. L. Rev. 623, 643 (1998) (Legislative internalization occurs "when international law norms become embedded into binding domestic legislation or even constitutional law that officials of a noncomplying government must obey as part of the domestic legal fabric").

37. 50 U.S.C. § 401 et seq. (1994)

38. KOH, *supra* note 3, at 54–57, 101–05. During the Vietnam War, the CIA blurred that line by conducting illegal secret domestic break-ins, mail intercepts, wiretaps, and domestic surveillance of antiwar activists and domestic protesters. Indeed, we sometimes forget that the infamous Watergate break-in was itself executed by the "plumbers," a White House unit funded with private campaign contributions, partially staffed by former CIA agents, supported by the CIA, and formed for the express purpose of "plugging leaks" by government officials suspected of having exposed the secret bombing of Cambodia. *Id.* at 56.

vote—enjoy a range of civil and political rights while residing in the United States roughly comparable to that of United States citizens.<sup>39</sup> Third, executive action, even in the name of national security, has been subject both to congressional oversight and regular, albeit usually deferential, judicial review.<sup>40</sup> Indeed, as recently as three months before September 11, the Supreme Court held that a law allowing indefinite detention of immigrants who could not be deported would pose a “serious constitutional problem.”<sup>41</sup>

In just the few months since, each of these three principles has been placed under tremendous strain. In the days following the attack, the President obscured the distinction between foreign intelligence and domestic law enforcement by creating an Office of Homeland Security virtually overnight. Under the direction of a Cabinet-level official not subject to congressional confirmation, the Office has been vested with sweeping but vague powers to coordinate domestic efforts against terrorism, including collection and analysis of information regarding activities of terrorists and terrorist groups within the United States.

Second, in response to intense White House pressure, and after radically truncated deliberation, Congress passed sweeping anti-terrorism legislation—the so-called “USA PATRIOT Act” (“Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terror”)—with potentially devastating impact on the civil liberties of aliens living in the United States.<sup>42</sup> The USA PATRIOT Act allows the Attorney General to detain non-citizens at length as suspected “terrorists” with minimal procedural safeguards.<sup>43</sup> Even without the new statute, by early November, more than 1,100 aliens and citizens had been detained on offenses unrelated to terrorism, some apparently based on associational activ-

39. See *Graham v. Richardson*, 403 U.S. 365 (1971); Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 *HAMLINE L. REV.* 51 (1985). Cf. GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS AND FUNDAMENTAL LAW* 139–64 (1996) (“Like citizens, aliens in the United States cannot be punished for their speech [religion, or associational activity] without a strong showing of necessity.”).

40. See KOH, *supra* note 3, at 123–49.

41. *Zadvydas v. Davis*, 121 S. Ct. 2491, 2498 (2001). The *Zadvydas* Court denied the government permission to hold immigrants indefinitely, even if the government said they were dangerous and did not have a right to remain in the United States.

42. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terror, H.R. 3162, 107th Cong. (2001) (enacted and signed into law October 26, 2001, as Pub. L. No. 107-56) [hereinafter USA PATRIOT Act]. For critical analyses of the provisions of the USA PATRIOT Act, see ACLU, *Fact Sheets on the USA-Patriot Act*, <http://www.aclu.org/safeandfree>. The clear import of the statute’s patriotic title is that it would have been unpatriotic to vote against it, something that only one member of both Houses—Senator Russell D. Feingold of Wisconsin—was courageous enough to do. Had the bill been called the “Round Up the Usual Suspects Act,” a title perhaps better suited to its substantive provisions, it might have received less unanimous support and more careful legislative scrutiny.

43. Immigrants certified by the Attorney General must be charged within seven days with a criminal offense or an immigration violation, but could potentially face indefinite detention, if their country of origin refuses to accept them, upon the Attorney General’s finding of “reasonable grounds to believe” that they are involved in terrorism or other activity that poses a danger to national security. USA Patriot Act, *supra* note 42, § 412.

ity. This detention authority, already broad, was then greatly expanded by the new antiterrorism law.<sup>44</sup>

The law allows information obtained during criminal investigations—with respect to U.S. citizens as well as aliens—to be distributed to U.S. intelligence agencies without meaningful limitation on how those agencies can use the obtained information;<sup>45</sup> grants the government “sneak and peek authority” to conduct covert searches of homes and private places in furtherance of criminal investigations;<sup>46</sup> authorizes law enforcement officials to access and disseminate highly personal student records of U.S. and foreign students;<sup>47</sup> and grants officials expanded wiretap authority to circumvent the probable cause requirement of the Fourth Amendment, allowing for potentially chilling invasions of privacy.<sup>48</sup>

In early November, Attorney General John Ashcroft alarmed lawyers and civil libertarians further by approving an order that would permit federal prison authorities to monitor communications between lawyers and their clients in federal custody, even if they have not been charged with any crime, whenever surveillance would be deemed necessary to prevent violence or terrorism.<sup>49</sup> A string of commentators have begun to discuss the necessity of relaxing our constitutional prohibition against torture in the name of fighting the war against terrorism.<sup>50</sup> Finally, at about the same time, President Bush declared an “extraordinary emergency,” and signed an order

44. See Press Release, Senator Russell D. Feingold, Statement On The Anti-Terrorism Bill (Oct. 25, 2001), <http://www.senate.gov/~feingold/releases/01/10/102501at.html> (“As it seeks to combat terrorism, the Justice Department is making extraordinary use of its power to arrest and detain individuals, jailing hundreds of people on immigration violations and arresting more than a dozen ‘material witnesses’ not charged with any crime. Although the government has used these powers before, it has not done so on such a broad scale. Judging from government announcements, the government has not brought any criminal charges related to the attacks with regard to the overwhelming majority of these detainees.”). See also Professor David Cole, Statement, Law and Liberty, *NewsHour with Jim Lehrer: Law and Liberty* (PBS Television broadcast Oct. 26, 2001), [http://www.pbs.org/newshour/bb/congress/july-dec01/patriot\\_10-26.html](http://www.pbs.org/newshour/bb/congress/july-dec01/patriot_10-26.html) (“Under this law, we impose guilt by association on immigrants. We make them deportable not for their acts but for their associations, wholly innocent associations with any proscribed organization, you’re deportable. In addition, [in] another radical change we allow the Attorney General to lock up immigrants on the Attorney General’s say-so with no hearing whatsoever, with no showing that they pose a danger. And it troubles me that we’ve directed the worst provisions of the law at immigrants, a group that doesn’t have a vote, a minority group, and we know that they’re going to be directed at Arabs and Muslims.”).

45. USA Patriot Act, *supra* note 42, § 203.

46. *Id.* § 213.

47. *Id.* §§ 416, 507.

48. *Id.* § 201. See also Jeffrey Toobin, *Crackdown*, NEW YORKER, Nov. 5, 2001, at 60 (quoting Morton Halperin, former Director of the Department of State Policy Planning Staff) (“What people have to understand is that there is a lower standard to getting [wiretaps under the new law]. You don’t have to show probable cause; you basically just have to ask for them. And, unlike a law enforcement tap, the government never has to tell the subject that they’ve done it. If the government thinks you’re under the control of a foreign government, they can wiretap you and never tell you, search your house and never tell you, break into your home, copy your hard drive, and never tell you that they’ve done it”).

49. See National Security: Prevention of Acts of Violence and Terrorism, Att’y Gen. Order No. 2529-2001 (interim rule) (to be codified at 28 C.F.R. pts. 500, 501).

50. See, e.g., Jonathan Alter, *Time to Think About Torture*, NEWSWEEK, Nov. 5, 2001 at 45.

placing any non-citizen he designates (potentially including nonresidents in the United States) as an accused terrorist under the control of the Secretary of Defense, who would then offer that person a "full and fair," trial before an ad hoc special military tribunal without guarantee of due process, appeal, or judicial review.<sup>51</sup> Although Justice Department officials defended the fairness of these military tribunals by reference to *Ex parte Quirin*,<sup>52</sup> a World War II case upholding the constitutionality of a secret military tribunal that executed German saboteurs, they nowhere mentioned the history of that case, which one legal historian has called "a fascinating tale of . . . a prosecution designed to obtain the death penalty; questions of judicial disqualification; a rush to judgment; an agonizing effort to justify a *fait accompli*; negotiation, compromise, and even an appeal to patriotism in an effort to achieve a unanimous opinion."<sup>53</sup> Not surprisingly, these intemperate actions have triggered a firestorm of protest, not just from the political left, but from across the American political spectrum.<sup>54</sup>

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51. The U.N. Special Rapporteur on the Independence of the Judiciary, Param Kumaraswamy, sent an urgent appeal to the U.S. Government regarding the military order signed by President George W. Bush on November 13, 2001 on the detention, treatment, and trial of certain non-citizens in the war against terrorism, expressing concern about, inter alia: the absence of a guarantee of the right to legal representation and advice while in detention; the establishment of an executive review process to replace the right to appeal the conviction and sentence to a higher tribunal; and the exclusion of jurisdiction of any other courts and international tribunals. See United Nations, *UN Human Rights Expert Concerned over Military Order Signed by United States President* (Nov. 16, 2001), United Nations News Centre, <http://www.un.org/apps/news/story.asp?NewsID=2173&Cr=terror&Cr1=law>. Clarifying that order after several weeks of intense criticism, the President's Legal Counsel made a dramatically more limited proposal in an op-ed piece in the *New York Times*. He asserted that the order "covers only foreign enemy war criminals," that "the president will refer to military commissions only noncitizens who are members or active supporters of Al Qaeda or other international terrorist organizations targeting the United States," that defendants "must be chargeable with offenses against the international laws of war," that "the president's order . . . does not require that any trial, or even portions of a trial, be conducted in secret," that "[e]veryone tried before a military commission will know the charges against him, be represented by qualified counsel and be allowed to present a defense," and that "[u]nder the order, anyone arrested, detained or tried in the United States by a military commission will be able to challenge the lawfulness of the commission's jurisdiction through a habeas corpus proceeding in a federal court." Alberto R. Gonzales, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27.

52. 17 U.S. 1 (1942).

53. David J. Danelski, *The Saboteurs' Case*, 1 J. S.Ct. HIST. 61 (1996). See also Robert E. Cushman, *Ex parte Quirin et al., The Nazi Saboteur Case*, 28 CORNELL L.Q. 54 (1942). For a characteristically incisive first-hand account of the appeal in the case by one of the government lawyers, see Boris I. Bittker, *The World War II German Saboteurs' Case and Writs of Certiorari Before Judgment by the Court of Appeals: A Tale of Nunc Pro Tunc Jurisdiction*, 14 CONST. COMMENT. 431, 431 n.1 (1997) ([T]here is no evidence that killing was a major, or even a subsidiary, goal of the would-be saboteurs," whom Bittker memorably describes not as menacing killers, but as "a lumpenproletariat of slovenly and quarrelsome misfits who, if they had eluded capture, might well have blown up themselves rather than their designated targets.").

54. See, e.g., George Lardner, Jr., *On Left and Right, Concern Over Anti-Terrorism Moves: Administration Actions Threaten Civil Liberties, Critics Say*, WASH. POST, Nov. 16, 2001, at A40; William Safire, *Seizing Dictatorial Power*, N.Y. TIMES, Nov. 15, 2001, at A31 ("Misadvised by a frustrated and panic-stricken attorney general, a president of the United States has just assumed what amounts to dictatorial power to jail or execute aliens. Intimidated by terrorists and inflamed by a passion for rough justice, we are letting George W. Bush get away with the replacement of the American rule of law with military kangaroo courts."). In early December, more than three hundred law professors and lawyers (including the author) wrote a letter to the Senate Judiciary Committee calling "the untested institutions contemplated by the [President's Military] Order . . . legally deficient, unnecessary, and unwise." Letter of Law Professors and

The constitutionality of these laws will no doubt be challenged in court. Nevertheless, the troubling message is that in just the first weeks after September 11, U.S. officials rushed to impose precisely the kind of extreme crisis restrictions that led to the *Pentagon Papers* case<sup>55</sup> and the Alien and Sedition Acts. Thus, as with international law, we can evaluate the course ahead by applying the following domestic rule of thumb: *the more the President chooses to respond to the unfolding crisis by acting secretly, unilaterally, or by sacrificing the Bill of Rights or core principles of our National Security Constitution, the more likely it will be for him to violate 'the spirit of the laws' in the months—and crises—to come.*

I do not deny the need for vigorous law enforcement in the face of an unprecedented terrorist threat. But neither can I escape the feeling that by creating such laws, we are helping the terrorists to take our freedoms. When the media calls this the “second Pearl Harbor,” as an Asian American, I cannot forget that the first Pearl Harbor triggered the internment of tens of thousands of loyal Americans based solely on their Asian ethnicity.<sup>56</sup> What too few recall is that this was the only time that the Supreme Court applied the test of strict scrutiny to a racial classification, but nevertheless upheld the restrictive law. Many forget that some of America’s most heralded civil libertarians—President Franklin Delano Roosevelt, who signed the executive order; Earl Warren, then-Attorney General of California; Supreme Court Justices Hugo Black and William O. Douglas—not only failed to challenge the internment, but affirmatively ratified it. Nor can I forget Justice Jackson’s haunting words in his *Korematsu* dissent: that that precedent “lies about like a loaded weapon ready for the hand of any authority that can bring for-

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Lawyers to the Honorable Patrick J. Leahy, Dec. 5, 2001 (on file with the Harvard International Law Journal). The letter argued that the Order “undermines the tradition of the Separation of Powers,” “does not comport with either constitutional or international standards of due process [because t]he President’s proposal permits indefinite detention, secret trials, and no appeals,” and allows the Executive to violate the United States’ binding treaty obligations in the International Covenant on Civil and Political Rights and the third Geneva Convention of 1949, which requires that every prisoner of war have a meaningful right to appeal a sentence or a conviction. The letter further argued that “[r]ecourse to military commissions is unnecessary to the successful prosecution and conviction of terrorists” and falsely “presumes that regularly constituted courts and military courts-martial that adhere to well-tested due process are unable to handle prosecutions of this sort.” *Id.* For elaboration of this point, see Harold Hongju Koh, *We Have the Right Courts for bin Laden*, N.Y. TIMES, Nov. 23, 2001, at A39 [hereinafter Koh, *We Have the Right Courts*]. Finally, the letter pointed out that the “use of military commissions would be unwise, as it could endanger American lives and complicate American foreign policy.” *Accord* Harold Hongju Koh, Editorial, TIME.COM, <http://www.time.com/time/nation/article/0,8599,186581,00.html> (“Our State Department daily challenges trials in military courts as human rights violations in Burma, Colombia, Egypt, and Turkey. Why should we be surprised when our European allies refuse to extradite captured terrorist suspects to military justice here? When the Chinese or Russians try Uighur or Chechen Muslims as terrorists in military courts, our diplomats protest vigorously and the world condemns those tribunals as anti-Muslim. How can we object if they treat our secret military tribunals the same way?”).

55. *New York Times Co. v. United States*, 403 U.S. 713 (1971). For a discussion of this case, see KOH, *supra* note 3, at 137.

56. *Korematsu v. United States*, 323 U.S. 214 (1944). See generally PETER H. IRONS, *JUSTICE AT WAR* (1993).

ward a plausible claim to an urgent need.”<sup>57</sup> Unfortunately, there seems to be no shortage of domestic authorities now prepared to make that claim.

At this writing, it remains uncertain whether the response to September 11 will undermine domestic civil liberties norms that have been developed and internalized over the centuries. As the U.N. Special Rapporteur for the Independence of the Judiciary noted in his recent appeal, President Bush’s military tribunals order is regrettable for “the wrong signals it sent, not only in the United States, but around the world” about the uncertain commitment the United States has to the rule of law.<sup>58</sup> Such extreme measures not

57. *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

58. See United Nations, *supra* note 51. A military court completely undermines the notion that we are engaged in an exercise of justice, and not vengeance; similarly, a secret proceeding that leads to the swift, nonjudicial execution of the defendant does not demonstrate to the world our superior commitment to human rights or the rule of law, the very grounds on which we must show ourselves to be more committed than our terrorist adversaries. As our response develops, I believe, we can pursue several accountability tracks that are far superior to the option of a military court: first, the possibility of indicting Osama bin Laden and his associates in a United States court (where they have already been indicted for the 1993 World Trade Center bombing); second, the possibility of trying terrorists in a foreign court, as was done in the *Lockerbie* case (which was tried in the Hague under Scottish law), see *Her Majesty’s Advocate v. Megrahi*, No. 1475/99, slip. op. (High Ct. Judiciary at Camp Zeist Jan. 31, 2001); third, considering an international criminal track before an ad hoc international tribunal; and fourth, allowing civil lawsuits in U.S. courts against terrorists, their state supporters, or their assets under U.S. law. My own view is that the U.S. government should send cases involving defendants charged with the murder of Americans on American soil to its own courts, unless there is a clear demonstration that those courts—which have successfully heard cases involving al Qaeda members—are somehow incapable of rendering full, fair, and swift justice in such cases. See generally Koh, *We Have the Right Courts*, *supra* note 54.

Some have argued that such cases should instead be heard before an international tribunal, preferably one in which both American and Muslim judges sit. See, e.g., Anne-Marie Slaughter, *Al Qaeda Should Be Tried Before the World*, N.Y. TIMES, Nov. 17, 2001, at A23. While I have long supported international adjudication, that option makes little sense here, in the absence of an existing tribunal with jurisdiction to hear these cases promptly. Even if the U.S. government were to support such a tribunal, it is highly unlikely that two other permanent Security Council members with a veto—Russia and China—would consent to the creation of a tribunal that might wrest away from them adjudication of Chechen or Uighur rebels whom they have labeled as “terrorists” in their own countries.

As I learned from my participation as a government official in recent efforts to try international crimes in Cambodia and Sierra Leone, building new tribunals from scratch is slow, expensive, and requires arduous negotiations. At this writing, the Sierra Leone tribunal has yet to hear any cases more than two years after the mass killings there, and the Cambodia tribunal has yet to hear any cases more than twenty-five years after the operative events! Although some argue that an international tribunal would be viewed as more impartial than a U.S. court, the impartiality of an ad hoc tribunal, created for the express purpose of trying the September 11 terrorists and their supporters, might well be more challenged in the Muslim world than a civilian court system that has been in place for more than two centuries. International tribunals are preferable only when there is no functioning court that could fairly and efficiently try the case, as was the situation in the former Yugoslavia and in Rwanda. We should remember that the last U.N. forum that occurred before September 11 was the World Conference against Racism, in which some Islamic countries attempted to use the forum to pursue their political grievances against Israel. See Ellis Cose, *Silver Linings From a Summit*, NEWSWEEK, Sept. 17, 2001, at 40. We could safely predict that such countries would similarly use their diplomatic clout to urge that any international tribunal created by the United Nations to try terrorists also try numerous Israeli officials who obviously had no connection to the September 11 attacks. In short, we should not hastily conclude that only international tribunals can grant meaningful justice for international crimes. As I have elsewhere argued, since the beginning of the Republic, U.S. courts have adjudicated violations of international law by private citizens under principles of international law. See generally Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991).



only signal the U.S. government's imprudent willingness to sacrifice fundamental human rights as a rule of law, but also send the troubling message that the destruction of four planes and three buildings is cause enough to sacrifice the spirit of the laws that is fundamental to this country's self-conception as the Land of the Free.

### III. CONCLUSION

The post-Cold War era, my colleague John Lewis Gaddis has said, began with the collapse of one structure—the Berlin Wall—and ended with the collapse of another—the World Trade Center.<sup>59</sup> After September 11, as Justice Harry Blackmun liked to say, “Freedom is not free.”<sup>60</sup> What he meant is that we love our freedoms. We took them for granted. Now we have to fight for them. We have to defend them. But most of all we have to use them.

In the months ahead, it will not be enough to defend our freedoms, *we must use those freedoms*. We need to speak out forthrightly about human rights violations, whether they are committed by terrorists or our allies, or even our own government officials. We need to reaffirm, loudly and publicly, that it is never unpatriotic to question what our government chooses to do in our name, especially in time of war.

We must respond to the September 11 tragedy in the spirit of the laws: seeking justice, not vengeance; applying principle, not merely power. We must respond according to the values embodied in our domestic and international commitments to human rights and the rule of law. If we are at war, that war will affect our children's future, and that future—I submit—is far too important for us, as lawyers, to leave to the politicians and the generals.

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59. John Lewis Gaddis, *And Now This: Lessons from the Old Era for the New One*, in *THE AGE OF TERROR: AMERICA AND THE WORLD AFTER SEPTEMBER 11* (Strobe Talbott & Nayan Chanda eds., 2002) (forthcoming).

60. E.g., Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 29 (1985).